Supreme Court, U.S.
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No.

Supreme Court of the United States

October Term, 1994

MICHAEL A. RIES
Petitioner,

v.

JOHN A. PICHA
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

David C. Weiner
Counsel of Record
3300 BP America Bldg.
200 Public Square
Cleveland, Ohio 44114
William D. Mason
Law Director,
City of Parma
Robert F. Coury
Chief Assistant
Law Director
6611 Ridge Rd.
Parma, Ohio 44129

Attorneys for Petitioner
Michael A. Ries

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QUESTIONS PRESENTED

1. Can an employee prevail against the City Mayor individually under 42 U.S.C § 1983 claiming he was discharged from his employment for protected political activity when the employee's position was eliminated by the City Council who acted without considering the constitutionally protected activity.

2. Should judgment as a matter of law be granted in favor of City Mayor when reasonable people could only conclude that City Mayor would have encouraged elimination of employee's position even in the absence of employee's protected political conduct.

PARTIES TO THE PROCEEDING BELOW

Michael A. Ries, individually and in his capacity as Mayor of Parma*, and the City of Parma were respondents in the Court of Appeals in Case No. 92-4262. The petitioner in the case was John Picha.

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*Picha has filed a motion to substitute the Estate of Michael A. Ries since his March 10, 1994 death while in office.

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PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit

Michael Ries petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on July 13, 1994 in Case No. 92-4262, in which the Court of

Appeals reversed the October 26, 1992 decision of the United States District Court for the Northern District of Ohio, Eastern Division.

OPINIONS BELOW

The decision and opinion of the Court of Appeals entered on July 13, 1994 is unreported and appears in Petitioner's Appendix. The October 26, 1992 decision of the United States District Court for the Northern District of Ohio, Eastern Division appears in Petitioner's Appendix.

JURISDICTION

The opinion below was entered on July 13, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C § 1983, **Civil action for deprivation of rights**, provides as follows:

> Every person, who, under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. § 1983

STATEMENT OF THE CASE

This case was filed by John Picha against the City of Parma, Michael A. Ries, individually and as Mayor of Parma, and Martin E. Vittardi, individually and as Parma Service

Director. It was tried in the United States District Court for the Northern District of Ohio, Eastern Division before a jury beginning on October 15, 1992. At the close of plaintiff's case on October 20, 1992, the trial court granted the defendant Vittardi's motion for judgment and overruled those motions as to defendants City of Parma and Ries.

On October 22, 1992 the jury returned its verdict for the defendant City of Parma. On October 26, 1992, the jury reported it was unable to reach a unanimous decision as to Michael Ries, and on that date the court granted defendant Ries' motion for judgment against plaintiff, thereby entering final judgment in this matter dismissing the case. On November 23, 1992, Plaintiff filed his timely notice of appeal. John Picha

raised no issue concerning the dismissal of Martin Vittardi.

A panel of the Court of Appeals for the Sixth Circuit reviewed the district court's decision and entered its judgment on July 13, 1994, reversing the judgment of the district court as to Michael Ries and affirming the decision as to the City of Parma and remanding for further proceedings consistent with its opinion.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND THERE IS NO LEGALLY SUFFICIENT BASIS FOR A VERDICT IN FAVOR OF RESPONDENT.

Plaintiff, John A. Picha, was the Chief Inspector of the city of Parma, Ohio. Parma is a nonchartered political subdivision of the State of Ohio, whose governmental structure and proceedings are

governed by Title VII of the Ohio Revised Code, and, with respect to its employees in the classified civil service, by Title I of the Code.

Mr. Picha was in the classified civil service and as such was prohibited from taking part in politics other than to vote as he pleases and to express freely his political opinions (Ohio Revised Code § 124.57). He had been appointed, at first temporarily, and then as a permanent civil service employee under the previous Mayor, John Petruska.

Plaintiff's chief duty was to supervise the work of City personnel engaged in inspecting the City's right-of-way public works projects during construction. The staff he supervised consisted of six or seven part-time, unclassified, at-will employees.

In the Democratic Party primary election in May, 1987, defendant Michael A. Ries defeated then-Mayor Petruska, and was subsequently elected as Mayor without opposition in November, 1987.

Previous to becoming Mayor, Ries was a Parma City Councilman from 1984 through 1987, having only legislative but not administrative authority as provided in Ohio Revised Code § 731.05. While serving as Councilman, Ries heard complaints from residents about right-of-way projects during committee and council meetings.

In the latter part of 1987, prior to assuming office on January 1, 1988, Mayor Ries had received calls from private firms promoting their services. One such firm, Solar Testing, while he was at their facility indicated it also provided right-of-way inspection services. Until then he was not aware that such private inspection

services were available before that meeting.

Shortly after becoming Mayor, Ries began to consider the merits of privatizing right-of-way inspections. He was introduced to Rick Capone, President of Quality Control, Inc. (Q.C.I.) by his City Engineer, Mr. Siefert, sometime in January or February 1988.

Among the concerns Mayor Ries had about the City inspections was a lack of documentation, which raised liability issues in the event of disputes with contractors. Service Director Vittardi had concerns about the quality of city streets and believed privatization would improve on-the-job inspection.

City Engineer Siefert requested legislation authorizing privatizing which was introduced into Council by all Members of Council on March 7, 1988. Extensive

hearings were held in City Council Committee after introduction, at which some of the City's part-time inspectors spoke, but plaintiff did not attend.

While the privatization legislation was pending before the finance committee, council members reviewed projects Q.C.I. was inspecting. They also heard testimony from Mr. Capone. Council's deliberation and study of the legislation was extensive. The legislation introduced in March was unanimously passed by City Council on May 4, 1988. Pursuant to it the Mayor and Service Director contracted with Q.C.I. City Council, as a matter of State law (Ohio Revised Code Title VII), had sole and complete authority to determine and to make the decision to eliminate Picha's position. Their decision was independent and based upon their own investigation.

It was the Mayor's intention to utilize the services of Q.C.I. along with the City staff for a period of time to find out in practice how the new system would work. The part-time persons were dismissed about June 1st or 2nd, 1988. Mr. Picha was retained until December 31, 1988, his job having been eliminated as redundant because there were no inspectors for him to supervise as a result of privatization authorized by Council.

Evidencing Mayor Ries' lack of concern regarding the issue of political affiliation, he reappointed Al Wenz as supervisor of the city's sign shop and graphic arts who, as a non-classified city employee was free to be, and was, a vocal, outspoken, and active campaigner for Petruska against Ries. Mayor Ries also appointed former councilman Gerald Boldt, an outspoken and public campaigner for

Petruska against Ries as the new Safety Director. He also reappointed Michael McGinty, who as city leader was co-chairman of, and active in, Petruska's re-election campaign to the Parma Hospital Board.

Mr. Picha was not important to Mayor Ries politically. As a classified civil servant, he was limited in his campaign activities by law. His claimed affiliation with former Mayor Petruska was not a factor in weighing or requesting the privatization legislation, or in laying him off. Nor did Mayor Ries ever have any confrontation with Mr. Picha nor was he angered by him, or feel, believe, or intend to violate Picha's First Amendment rights. Mr. Picha did not testify as to any hostility by Mayor Ries toward him.

In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274,

287 (1977), the Supreme Court enunciated the principle that for a plaintiff to prevail on a claim of a constitutional violation justifying remedial action, he must prove that the constitutionally protected conduct was a motivating factor in the employment decision. Only upon such proof should the court then determine whether a defendant has shown by a preponderance of the evidence that he would have reached the same decision even in the absence of the protected conduct.

It is conceded that City Council was not motivated by Picha's protected activity. There is no evidence that City Council had any statute, ordinance, regulation, custom, or usage which predicated city employment on political affiliation. Nor is there one iota of evidence that the ordinance authorizing privatization of the inspection service

was in any manner predicated on political considerations or the political affiliations of John Picha. There is, however, ample evidence that City Council, an independent legislative body within the municipal government, based it decision to privatize the inspection service only upon legitimate economic and service concerns. City Council had exclusive control and authority to make the legislation. Their decision was unanimous.

Assuming that the standard enunciated in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989), is applicable in the within § 1983 action, the application of the "but-for" analysis will lead to the same conclusion, i.e. that Picha cannot prevail as the alleged constitutionally protected conduct was not a motivating factor in City Council's

employment decision. This court in *Price Waterhouse*, *id.* at 1787 stated

> ... once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role ...

In the present case, the substantial evidence to support the jury verdict that the City of Parma (acting through City Council) was not motivated by Picha's protected activity, inexorably leads to the conclusion that the alleged political ill will of Mayor Ries toward Picha could not have been a legal cause of Picha's position elimination. Here it is undisputed that Mayor Ries did not have the authority to privatize Picha's position, that only the City Council had such authority, and that it was the unanimous vote of the Council that

privatized the position. It is legally irrelevant if Mayor Ries first presented the notion of privatizaton to Council.

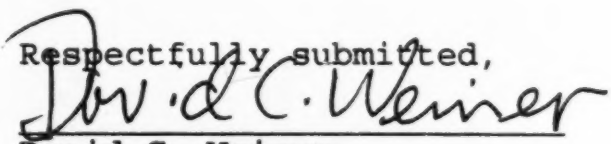
The lower court in the within action relies on *Simpson v. Diversitech, General, Inc.*, 1945 F.2d 156 (6th Cir. 1991) (*See* Appendix p. 17a) in determining that a finder of fact could determine that Ries' actions, if motivated by political retribution, were a "but-for" cause of Picha's dismissal by the City. That decision and the lower court's reliance thereon is in clear conflict with this Court's decision in *Mt. Healthy* and *Price Waterhouse*. This Court in *Price*, *id.* at 1792 stated, "Conventional rules of Civil litigation generally apply in Title VII Cases, see, e.g., *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716, ... (discrimination not to be "treat[ed] ... differently from other

ultimate questions of fact") ... " In the present Case Respondent is required to prove causation. In other words, was Ries's alleged retaliatory animus a "but-for" cause of City Council's decision to privatize the City's inspection program. As City Council made an independent decision based upon legitimate service concerns after hearings and its own investigation, such alleged animus on the part of Ries was not a cause of Respondent's discharge. Therefore Respondent's claim must fail.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,



David C. Weiner
Counsel of Record
3300 BP America Bldg.
200 Public Square
Cleveland, Ohio 44114
William D. Mason
Law Director,
City of Parma
Robert F. Coury
Chief Assistant
Law Director
6611 Ridge Rd.
Parma, Ohio 44129

Attorneys for Petitioner
Michael A. Ries

APPENDIX

NOT RECOMMENDED FOR PUBLICATION

No. 92-4262

FILED

JUL 13 1994

LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN A. PICHA, Plaintiff-Appellant	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
v.	
CITY OF PARMA and MICHAEL A. RIES, individually and in his official capacity as Mayor of Parma, Defendants-Appellees.	

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This opinion is not precedential, digested in the Federal Reporter or reviewed.

BEFORE: **MILBURN and GUY**, Circuit Judges;

and **BROWN**, Senior Circuit Judge.

PER CURIAM. John A. Picha appeals the judgment based on the jury verdict in favor of the City of Parma (the City) and the judgment granted by the district court as a matter of law in favor of Mayor Michael A. Ries in this 42 U.S.C. § 1983 action. We **REVERSE** the judgment as to Ries, **AFFIRM** the judgment as to the City, and **REMAND** to the district court for further proceedings consistent with this opinion.

I.

This is the second time that this case has reached our court. In a previous opinion, also unpublished, we held that summary judgment for all defendants[1] was inappropriate. *Picha v. City of Parma*, No. 91-3501, 1992 WL 57419 (6th Cir. March 25, 1992). Picha's claims under § 1983 stemmed from his loss of employment with the City in 1988, after 17 years as Chief Inspector. He alleges that his employment as a classified employee was terminated, by privatizing the inspection department, in retaliation for his political activity in support of Mayor Ries's opponent, then-Mayor John Petruska,

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[1] Martin E. Vittardi, another city official, was also sued in his individual and official capacity in the original complaint. After the grant of Vittardi's motion for judgment as a matter of law at the close of Picha's presentation at trial of his case in chief, Picha has failed to appeal that ruling to our court.

in the 1987 Democratic primary for mayor. and that this termination violated his right to freedom of speech under the First Amendment.

We held in our earlier decision that, on the summary judgment record, there were genuine issues of material fact, precluding summary judgment, concerning the motivation for Picha's dismissal on the part of both Mayor Ries and the City Council, whose vote actually privatized Picha's department. Picha had presented evidence in affidavit form, most notably from former City Tax Commissioner Richard Leirer, that Ries had desired to terminate Picha because of his political activity on behalf of Petruska. There was also an affidavit from council member Linda Cross that Ries persuaded the City Council to pass the legislation necessary, to privatize the City's building

inspection program, thus abolishing Picha's position as Chief Inspector of the City, by promising that Picha would be given a job in the building department and would not simply be terminated by the City. *Id.* Leirer also stated that Mayor-elect Ries's staff had compiled a "hit list" of current City employees who had supported Petruska and whom Ries wanted removed from their jobs, and that Mayor-elect Ries had asked Leirer to list the possible ways to terminate Picha. We concluded, in reversing the grant of summary judgment to the defendants, that this was "strong circumstantial evidence of an intent to fire Picha through any means possible. This evidence, coupled with the testimony of Leirer, Cross, [former City Engineer Russell] Reinke, and Picha that Picha's political activities were widely known, would allow a

reasonable juror to infer a political motivation for Picha's discharge." *Id.* at *4.

The testimony offered by Picha at trial was substantially the same as the statements that this court relied on in precluding summary judgment for the defendants in our earlier disposition of this case. There was not, however, any evidence or any contention at the trial that the City Council voted to abolish Picha's job to punish him for his political activity. At the close of the evidence, the jury was given a series of interrogatories to which to respond.[2] The

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[2] Interrogatory Number 1[: H]as the plaintiff established by a preponderance of the evidence that he has engaged in protected political activity under the First Amendment, yes or no? . . .

Interrogatory Number 2[: H]as the plaintiff established by a preponderance of the evidence that his protected activity was a substantial or motivating factor in defendant City of Parma's abolishing plaintiff's job, yes or no? . . .

Interrogatory Number 3[: H]as the defendant

jury answered only the first two interrogatories, expressing its conclusions that Picha's political activity in support of Mayor Petruska was protected by the First Amendment but that this activity was not a motivating factor in the City's decision to abolish his job.

City of Parma shown by a preponderance of the evidence that it would have taken the same actions without considering the plaintiff's political activity, yes or no?

Interrogatory N[umber] 4[:] Were the defendant City of Parma's actions in this matter a pretext to cover up [its] real reasons and motives..., yes or no?

Interrogatory Number 5[: H]as the plaintiff established by a preponderance of the evidence that his protected activity was a substantial or motivating factor in defendant Ries' abolishing plaintiffs job, yes or no?

Interrogatory Number 6[: H]as the defendant Ries shown by a preponderance of the evidence that he would have taken the same actions without considering the plaintiff's political activity, yes or no?

Interrogatory Number 7[:] Were defendant Ries' action [sic] in the matter a pretext to cover up his own role? Yes or no?

J. App. at 560-61. The remaining interrogatories concerned the extent of the damages.

The district court entered judgment in favor of the City on the basis of this partial verdict. It also entered judgment as a matter of law in favor of Ries, stating that "the evidence is overwhelming that the decision to privatize [the City's inspection program] would have been reached quite apart from [plaintiffs political status]" and "also because . . . it would be advisable at this point to have all matters legally and procedurally disposed of by the Sixth Circuit at one time." This timely appeal followed.

II.

We first address the issue of whether the district court erred in granting Ries's motion for judgment as a matter of law. We review the district court's holding *de novo*, using the same standard as applied by that court, so that Ries's motion should have been granted

only if the evidence presented at trial, viewed in the light most favorable to Picha, makes it clear "that reasonable people could come to but one conclusion," namely, that there is no legally sufficient basis for a verdict in favor of Picha. *Hill v. McIntyre*, 884 F.2d 271,274 (6th Cir. 1989) (internal quotation marks omitted). Moreover, as the Supreme Court has made clear, the test for judgment as a matter of law is essentially the same as that for summary judgment, i.e., "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,251-52 (1986).

III.

The legal test for whether a discharge from public employment violates

a public employee's First Amendment rights was set forth by the Supreme Court in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). The plaintiff makes his prima facie case by "show[ing] that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' or to put it in other words, that it was a 'motivating factor' in the.. · decision . . . [to fire] him." *Id.* at 287 (footnote omitted). Once this showing is made, the burden then shifts to the defendant to rebut plaintiff's prima facie case by showing "by a preponderance of the evidence that it would have reached the same decision as to [plaintiff's employment] even in the absence of the protected conduct." *Id.*

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court drew a close analogy between the burdens

of proof in the Title VII[3] gender discrimination case at hand and those involved in a First Amendment case such as *Mt. Healthy*. *Id.* at 248-49. In so doing, it stated that "[a] court that finds for a plaintiff under this standard [requiring proof by a defendant employer that it would have fired the plaintiff even in the absence of protected conduct] has effectively concluded that an illegitimate motive was a 'but-for' cause of the employment decision." *Id.* at 249. Moreover, our court has often pointed out the close relationship between the burdens of proof for Title VII employment discrimination claims and claims under 42 U.S.C. §§ 1981 and 1983. *See Boutros v. Canton Regional Transit Auth.*, 997 F.2d 198, 202 (6th Cir. 1993) ("This Circuit

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[3] 42 U.S.C. § 2000e et seq. (1988).

has held that the required elements of prima facie proof necessary for a plaintiff charging a racially hostile work environment under both Title VII and 42 U.S.C. § 1983 are the same."); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992) ("The [same] formula is the evidentiary framework applicable not only to claims brought under Title VII, but also to clams under . . . 42 U.S.C. § 1981 .... ") (citations omitted).

As noted above, the proof at trial was essentially the same as the proof in opposition to summary judgment, but there was not, as stated, any proof or contention that the City Council privatized Picha's job as punishment for his political activity. Although Ries introduced some evidence that his desire to privatize was solely motivated by his aim to increase efficiency and to save

money, a reasonable juror could find, based upon all the evidence presented, that Ries would not have recommended the abolition of Picha's department absent a desire to punish Picha for his protected political activity, or in other words, that Ries's retaliatory animus was a "but-for" cause of his decision to seek privatization of the City' s building inspection program. This case is complicated, however, by the fact that the effective decision to privatize the City's inspection program, and therefore to eliminate Picha's job, was made not by Ries himself but by the City Council, a legislative body wholly independent of Ries's direct control. As stated, there is no proof or even a contention that the City Council reached its decision, although certainly heavily influenced by Ries's persuasion, for purposes other than

to increase the efficiency and reduce the costs of city government. The question we must next address, therefore, is whether Ries should be granted judgment as a matter of law because his input into the decisionmaking process, although illegally motivated, was too remote for it to be considered a legal cause of Picha's dismissal.

Our jurisprudence answers this question, teaching that the relative remoteness of Ries's role in the privatization decision does not break the legal chain of causation between his illegal animus against Picha and Picha's ultimate dismissal. In *Simpson v. Diversitech General, Inc.*, 945 F.2d 156 (6th Cir. 1991), a Title VII employment discrimination case, an employee was fired after three incidents of insubordination. He claimed that the second incident, which

led to his being required to enter into a Last Chance Agreement with his employer and to his eventual discharge for violating the terms of that agreement, would never have been reported but for the racial animus of one of his supervisors, Richard Ruckman. *id.* at 160. The only role that the illegal motivation played in Simpson's discharge, however, was in the reporting of the second incident, because all other decisions, including the ultimate decision to terminate Simpson, were made by independent actors who possessed no proven discriminatory motive and whose judgment was in no way influenced by the racial attitudes of Ruckman. *Id.* at 159-60. We applied to these facts the test in *Price Waterhouse*, identical to the one in *Mt. Healthy*, whereby a defendant relying on an illegal "motivating factor" for terminating an

employee can escape liability only when it can prove that the illegal motivation was not a "but-for" cause of the discharge, *id.* at 159, in other words, when the employer can prove that the employee would have been terminated even without the illegal animus towards him. We held that "[i]f Ruckman initiated the disciplinary, action leading to Simpson's dismissal due to Simpson's race, simply showing that Ruckman had no role in the 'final' decision to terminate him is insufficient to establish that Diversitech would have made the same decision even absent the racial animus[4] *Id.* at 160. *See also Saye*

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[4] Diversitech is instructive in this context because, as noted supra, the burdens of proof for the parties in a Title VII case are virtually the same as in a § 1983 case. This does not mean, however, that all legal issues have the same outcome for the two types of cases. Diversitech stands for the principle, applicable to § 1983 cases such as the one at hand, that a supervisor's illegal animus against an employee can be the "but-for" cause of that employee's termination even

v. St. Vrain Valley Sch. Dist., 785 F.2d 862, 867 (10th Cir. 1986) (finding that retaliatory animus by school principal against plaintiff's protected union activities could be "motivating factor" for plaintiffs dismissal even though "none of the school board members who voted not to renew Saye's employment were aware of her union involvement").[5]

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though the supervisor was not the ultimate decisionmaker responsible for the termination. Because Diversitech was a Title VII case, this principle resulted in liability for the employer, based upon the doctrine of respondeat superior. As made clear by Mortell v. Department of Social Servs., 436 U.S. 658 (1978), however, a municipal entity such as the City of Parma may not be held liable in a § 1983 case under the theory of respondeat superior. Thus, although the principle stated above holds good in § 1983 cases, it cannot serve as a basis for Picha's claim against the City; it can do so, of course, for his claim against the Mayor.

[5] Just as Saye involved negative evaluations of the plaintiff's work performance as a rationale for termination, so in the case at hand Mayor Ries attempted to justify the abolition of the City's inspection program by presenting testimony to the City Council that there had been problems with the quality of the work by the in-house inspection team.

This reasoning also underlay the result in *Professional Ass'n of College Educators v. El Paso County Community College Dist.*, 730 F.2d 258 (5th Cir.), *cert. denied*, 469 U.S. 881 (1984). In that Fifth Circuit case, a college president recommended to the board of trustees that one of the college's deans be dismissed, in retaliation for the dean's protected First Amendment activities. The board dismissed the dean, without any member, however, being aware of the president's motive for making his recommendation. The court affirmed the award of damages against the college president, framing the causation issue as follows:

> The causation issue in first amendment cases is purely factual: did retaliation for protected activity cause the termination in the sense that the termination would not have occurred in its absence? It is not necessary that the improper motive be the final link in the

> chain of causation: if an improper motive sets in motion the events that lead to termination that would not otherwise occur, intermediate step[s] in the chain of causation do not necessarily defeat the plaintiffs claim.

Id. at 266 (internal quotation marks omitted).

Applying these cases to the case at hand requires a similar outcome. As long as it is established that Ries initiated the process leading to Picha's termination on the basis of an illegal motivation, namely, as retaliation against Picha because of his protected First Amendment activity, then Ries can be held liable under the *Mt. Healthy* test for a violation of Picha's constitutional rights. Because a rational juror could find, on the basis of all of the evidence presented at trial, that Ries's actions, motivated by political retribution, were a "but-for" cause of Picha's dismissal by

the City, Ries is not entitled to judgment as a matter of law.

IV.

We next address the issue of the City's liability. As heretofore noted, the jury found that Picha's protected activity was not a substantial or motivating factor in *the City's* abolishing Picha's job. It is clear, from the court's charge, that the motivation of "the City" in abolishing the job was to be determined only by determining the motivation of the City Council in privatizing the work that Picha had been doing as a classified employee. The proof is ample to support the verdict that the City Council was not motivated by Picha's protected activity, and we do not understand Picha to contend the contrary. Moreover, under *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), the City cannot be held to be liable, with

respect to the action of the Mayor, under the doctrine of *respondeat superior*.

It is true that, under *Feliciano v. City of Cleveland*, 988 F.2d 649 (6th Cir.), *cert. denied*, 114 S. Ct. 90 (1993), the City could be held liable for an unconstitutional action by the Mayor, but only if the Mayor had final authority to take the action. Here it is undisputed that the Mayor did not have authority to privatize Picha's job, that only the City Council had such authority, and that it was the vote of the Council that privatized Picha's job.

Picha also alleged, and apparently still contends, that the City could have been held liable because the Mayor illegally failed to allow Picha recourse to other city employment, in violation of Ohio law, and that this issue should have been submitted with respect to

his claim against the City. In effect, Picha contends the Mayor thereby violated a City policy, a policy required by the Ohio administrative code. Because, however, Mayor Ries is alleged by Picha to have violated the City's policy in failing to offer Picha other employment, Picha cannot, for relief against the City, rely on *Monell* and *Feliciano*.[6] Picha has failed to prove any policy of the City of Parma that resulted in his termination from the City's employment.

V.

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[6] Picha also points out that his counsel urged the district court to charge the jury as to the circumstances under which the City could be liable for the wrongful conduct of Mayor Ries in bringing about his dismissal. In response to counsel, the district court replied, unaccountably: "I don't think it matters because the City is going to be liable for the actions of the mayor anyway, so I don't think it's prejudicial to the plaintiff." Actually, Picha was not entitled to such a charge because, as has been seen, there was no basis in the record to hold the City responsible for the allegedly illegal and unauthorized conduct by Mayor Ries. See *Monell* and *Feliciano*, *supra*.

For the reasons stated above, we **REVERSE** the judgment of the district court as to Mayor Ries and **AFFIRM** the judgment as to the City of Parma. We **REMAND** this case for further proceedings consistent with this opinion.

No. 92-4262, Picha v. Parma

GUY, J., concurring. I concur in the result only because, under these circumstances, I believe that a reasonable juror could find Ries liable; however, that result is certainly not mandated by the facts.

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1994

MICHAEL A. RIES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CERTIFICATE OF SERVICE
	)	
JOHN A. PICHA,	)	
	)	
Respondent.	)	

This is to certify that three (3) copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit were served on Andrew L. Margolius, Esq., Attorney for Respondent John A. Picha, 55 Public Square, Suite 1600, The Illuminating Building, Cleveland, Ohio 44113 (Telephone No. 216/621-6214) the 11th day of October, 1994 by First Class U. S. Mail postage prepaid.

David C. Weiner

DAVID C. WEINER
Counsel of Record for Petitioner